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THE OTHER SIDE OF THE "WADLEY CASE."

H. G. Wadley was sued in the United States Circuit Court for the Western District of Virginia by the creditors of the Wytheville Insurance and Banking Company, of which he was President, for $196,342.24, which they alleged he appropriated out of the funds of that institution to his individual use, in fraud of their rights in the premises.

After he had been thus sued, these same creditors, by very reprehensible means, as shall hereafter appear, procured his indictment in the County Court of Wythe county for the embezzlement and larceny of the identical sum of money for which they had sued him in the Circuit Court of the United States.

That court, Judge Goff presiding, seeking to maintain its jurisdiction, first acquired, of both the parties and the subject matter, and therefore exclusive, enjoined the criminal prosecution so instituted, until the final disposition of the civil suit pending therein, and, as is the case in the granting of any injunction by any judicial tribunal, *until the further order of the court.*

This proceeding and ruling of Judge Goff is made the subject of criticism in the June number of the VIRGINIA LAW REGISTER by one of the counsel for the creditors in their civil suit, and also in their subsequent criminal prosecution against Mr. Wadley, both of which proceedings were instituted by the same parties upon the same subject matter, and the latter as an aid to the former in the recovery from Wadley of the money alleged to have been improperly appropriated by him.

We doubt the propriety of discussing *a pending case* in a law journal. Courts are the proper forums for such discussions. But we would, perhaps, be derelict in our duty to our client if we should allow to go unchallenged an arraignment before the bar of public opinion of

a decision in his favor, by the counsel of his defeated and chagrined adversary, while the prosecution against him is still pending.

The ground upon which Judge Goff's opinion and ruling are assailed is that a Federal judge has no jurisdiction to restrain a State or its officers from prosecuting a citizen for the violation of a criminal law, the validity of which is not questioned. No such question was involved in the "Wadley Case," and no such ruling was made by Judge Goff. The question in the case was, to quote from Judge Goff's opinion: "Shall a court which has first acquired jurisdiction of the parties to, and the subject-matter of, a controversy, retain the exclusive control of the same until it has fully disposed of the question raised by the pleadings before it?" All of the authorities being that way, the learned Judge decides this question in the affirmative, holding that the rule is the same in both civil and criminal cases, and that if the State court first acquired jurisdistion, the United States courts must not, and will not, interfere; but, on the other hand, where the jurisdiction of the United States court has been first prayed and granted, it will not tolerate interference by the courts of a State, with judicial proceedings before it, and exclusively within its jurisdiction. The facts upon which Judge Goff based this opinion were as follows:

The creditors of the Wytheville Insurance and Banking Company had not only sued the company, but had also sued Wadley *individually* in the same suit, for an alleged misappropriation of its funds. These creditors had knocked at the door of Judge Goff's court and gained admittance. Their attorneys in representing them were exercising the privileges of their profession in the same tribunal. These creditors, by their counsel, had impleaded Mr. Wadley individually in the United States Circuit Court, upon a claim for $196,342.24. After the civil suit was brought, but before the indictment was found, these creditors, by their counsel, issued a printed circular, calling a meeting of themselves at the law office of one of their counsel in Wytheville, with a view of combining and putting on foot measures to compel Mr. Wadley to pay them. The meeting was held April 25, 1894, and these creditors, by their counsel, transmitted a proposition of compromise in writing to Mr. Wadley, that he pay them fifty cents on the dollar of the money which they alleged he had stolen, and notified him that he had only ten days to consider the proposition. At the same time, as the evidence discloses, and as Judge Goff remarks in his opinion, they had an understanding among themselves that if he declined the proposition they would procure his indictment in the County Court of Wythe

county, for misappropriation of the funds of said company. The money required to carry on such a criminal prosecution was arranged for at the same meeting.

Mr. Wadley, in a manly way, promptly declined the offer of compromise, or whatever it might be legally termed, based upon the idea that he was guilty of a felony. As soon as he declined this proposition, preparations were made to indict him. The attorney for the Commonwealth began the preparation of an indictment, assisted by one of the attorneys for said creditors, to be submitted to a grand jury to be impaneled at the following May term of the County Court of Wythe county. The indictment covered forty pages of type-written matter. It was drawn in the office of one of the counsel for the creditors, reduced to type by his type-writer, and was afterwards interlined in many instances by this attorney for the creditors, in his own handwriting. The Commonwealth's attorney directed the issuance of *subpœnas* summoning the five lawyers, counsel for said creditors, to appear before the grand jury to testify against Wadley, and directing the one who had assisted in preparing the indictment to bring before the grand jury the deposition of Mr. Wadley, taken in the civil suit pending in the United States Circuit Court.

The grand jury was impaneled on the 14th day of May, 1894, and these five lawyers went before it, one of them taking before it a copy of Mr. Wadley's deposition in the civil suit, and the indictment was found upon the testimony of these five lawyers and Mr. Wadley's own deposition taken in the civil suit. No other witnesses were summoned before the grand jury to testify against Mr. Wadley. These lawyers knew nothing against him of their own knowledge, and the use they made of his deposition was forbidden by the Bill of Rights which forms a part of the Constitution of Virginia; by Article V of the Amendments to the Constitution of the United States; by Section 860 of the Revised Statutes of the United States; by Section 3901 of the Code of Virginia, and by the adjudications of courts, State and Federal, of last resort.

While they appeared before the grand jury ostensibly as witnesses, they were really there in behalf of said creditors, and as prosecutors of Mr. Wadley. He would not compromise, and they wanted to make him—Bills of Rights, Constitutions, statutes, acts of Congress and decisions of courts of last resort, to the contrary notwithstanding.

A grand jury is a secret body, sworn to make true presentments, without prejudice or ill-will, fear or favor, and into whose presence an

employed private prosecutor has no right to intrude himself. The presence of such a prosecutor before a grand jury vitiates the indictment, if found, and it is to be hoped that no Virginia court will ever allow a man to be prosecuted upon an indictment thus found.

As soon as this indictment was presented in court, one of the same counsel for the same creditors who had assisted in preparing the indictment, and partly upon whose testimony it was found, immediately appeared in court to assist the Commonwealth's attorney in prosecuting Mr. Wadley, and shortly afterwards another of them appeared in the same capacity. Soon after the indictment was found, these same creditors, by their same counsel, issued another circular calling upon the creditors of the Wytheville Insurance and Banking Company to contribute 2½ *per cent.* of their claims in cash, to pay counsel to prosecute the indictment.

Yet we are told in the criticism of Judge Goff's opinion that the only allegation of the bill sustained by the proof was that, at the request of one of the grand jurors, the attorney for the Commonwealth allowed a copy of Mr. Wadley's deposition to be taken before the grand jury. This deposition was taken before the grand jury, in the first place, without any request of a juror, and without any knowledge of the grand jury that it would be brought before it, and against an intimation made by the court from the bench that he did not want any such use made of it. How widely Judge Goff differs in his view of the evidence from the gentleman who essays to criticise his opinion is shown by the following extract from his opinion:

"I find from the testimony in this case, that after the creditors of the Wytheville Insurance and Banking Company had intervened and been made parties complainant in the said suit of Paul Hutchinson's Adm'r, &c., against that company and others, and after they had proven their claims before the master, and he had formulated his report, that they, in a meeting called and held by them to determine the proper course for them to pursue, in the light of the case as shown by said report, and Wadley's deposition, concluded to submit to him, the said Wadley, an offer to adjust the debts reported by said master (as to which it was claimed he was individually liable) at the rate of fifty cents on the dollar, at the same time having an understanding among themselves that if he declined such proposition they would procure his indictment in the County Court of Wythe county, and prosecute him for the misappropriation of the funds of said company, . . . the money required to carry on such criminal procedure being arranged for at the same meeting that the offer of conference was agreed to. And also do I find, that when such offer was declined by Wadley, they proceeded to procure his indictment, using for that purpose a copy of his deposition so given before the master of this court, and evidently procuring the summoning

of their counsel as witnesses before the grand jury (some of whom declined to go before that body unless they were first duly subpœnaed so to do), and having them assist in the preparation of the bill of indictment, and in the prosecution of Wadley under it. That the criminal procedure, when first suggested, was intended to aid the creditors in adjusting their debts with Wadley is, I think, without doubt, and the fact that the effort failed is, so far as the matter now before me is concerned, immaterial. The circumstances were, it must be conceded, unusually anomalous, such as to naturally cause indignation and excitement; yet, nevertheless the evidence discloses conduct that cannot be justified, and is far from being conducive to the fair administration of justice; that it is, in fact, most reprehensible, dangerously near the borderland that divides impropriety from criminality, and I truly hope that never again in this jurisdiction will an effort be made to duplicate it.

"We now have nothing to do with the questions that involve the guilt or innocency of Wadley, on the charges set forth in the indictment, or his liability because of mismanagement by him of the affairs of the said Wytheville Insurance and Banking Company, as alleged in the proceeding before referred to. These matters, in the regular discharge of judicial procedure, in due time and place, will be considered and disposed of. We are now concerned in seeing that all the parties to this litigation, plaintiffs and defendants, debtors and creditors, accusers and accused, shall each and all have every proper opportunity to fairly present their respective claims, and also that the court is neither hampered nor delayed in reaching a just conclusion."

The very creditors who had impleaded Mr. Wadley in Judge Goff's court, through the very counsel who instituted the civil proceedings therein for them, after offering Mr. Wadley a proposition of compromise of the very controversy then pending in Judge Goff's court, and threatening to prosecute him if he did not accede to it—these creditors, by the testimony of their attorneys, and by the unconstitutional and unauthorized use of Mr. Wadley's deposition and other papers on file in Judge Goff's court, without his permission, for the purpose of aiding them in the adjustment of their claims against Wadley, succeeded in having him indicted in the County Court of Wythe county for the embezzlement and larceny of the very funds for which they had sued him, and subscribed money to pay their attorneys whom they had thus employed to sue, indict and prosecute him. They converted the whole criminal machinery of the Wythe County Court into a collection agency. A chancellor who would not enjoin a prosecution under such circumstances would be unworthy of confidence or respect.

The principle that courts of equity will protect and maintain their jurisdiction when once and first acquired, against all other tribunals, civil or criminal, is as old as jurisprudence itself, and needs the citation of no authority to sustain it.

As Judge Goff remarks, 'if circumstances can possibly exist where this principle is to be applied, they were certainly before him in the Wadley case'.

His jurisdiction first acquired was ignored, his process abused, and depositions and papers in his court illegally used for improper purposes without his permission—all this done by the very plaintiffs who had invoked his aid, prayed his jurisdiction and obtained it, and by their attorneys who enjoyed the high privilege of practising in his court. These creditors, having impleaded Mr. Wadley in the Circuit Court of the United States for a certain sum of money, afterwards entered into a conspiracy to intimidate and blackmail him into payment, or compromise, of their demands.

It must be borne in mind that the prosecution was enjoined because it was instituted by the plaintiffs in the civil suit, after the civil suit was brought, and for the purpose, conclusively established by the evidence, not to convict or punish Mr. Wadley, but to compel him, by threats of conviction and punishment, to compromise the demand upon which they had previously sued him in Judge Goff's court.

A court of equity will not enjoin a criminal prosecution in another forum unless instituted by a plaintiff in the equity court against a defendant previously impleaded therein, upon the same subject of controversy.

We are told in the criticism of Judge Goff's opinion, that the Judge "asserts the doctrine broadly, and without qualification, that where a Circuit Court of the United States acquires jurisdiction over the affairs of an insolvent corporation, and over its officers and creditors, no officer of the corporation can be prosecuted in a State court, without the consent of the Federal court, for embezzling the assets of the company, until the affairs of the corporation are wound up, and the civil suit in the United States court finally disposed of."

We search in vain to find any such doctrine asserted in Judge Goff's learned and able opinion.

Wadley was sued individually in Judge Goff's court by the same plaintiffs, who afterwards, by the unlawful use of papers on file therein, procured his indictment in another forum, for the larceny of the very money for which they had sued him in Judge Goff's court. If citizens of Wythe county, who were not plaintiffs in the civil suit, whether actuated by malicious or patriotic motives, had procured the indictment, Judge Goff could not, and would not, have interfered, although the prosecution would have embarrassed Wadley in his de-

fense to the civil action. Judge Goff interfered because the plaintiffs in the civil suit were the head and front of the prosecution, having instituted it, controlling it, and carrying it on, not to punish crime, or to vindicate the law, but, if possible, to intimidate Wadley into what they were pleased to term a "compromise" of the controversy pending against him in the Circuit Court of the United States.

The rule of law is supported by both reason and authority, that a court of equity will not allow a plaintiff who has sought redress therein, upon a matter within its jurisdiction, afterwards, without its permission, to seek the same redress against the same defendant in another forum, civil or criminal. There is a studious effort in the criticism of Judge Goff's opinion to create the belief that the Commonwealth of Virginia was alone interested in the prosecution of Mr. Wadley. The injunction is not a suit against the State. It is simply a court of equity maintaining its jurisdiction under a well-settled principle of law, hoary with age; and creditors who seek to evade this jurisdiction cannot skulk behind the Eleventh Amendment to the Constitution of the United States, denying the courts of the United States jurisdiction in suits prosecuted against one of the United States by citizens of another State or country. Such amendment has no application to the case in hand. They seek to make a "protecting shield" out of Commonwealth's Attorney Gleaves, on the ground that to enjoin him in his official capacity is to enjoin the State of Virginia.

It was proper to enjoin Mr. Gleaves under the facts of the case under discussion, but it was wholly unnecessary. Surely no lawyer will contend for a moment that Judge Goff could not enjoin the said creditors and their counsel from prosecuting Mr. Wadley in the premises, and also prevent the use of papers on file in his court in the prosecution. Such a restraining order in this case would have stopped the prosecution for want of evidence, whether Mr. Gleaves was enjoined or not. So, practically, it is immaterial whether Gleaves was enjoined or not, as the result would have been the same. The rule of law under which Judge Goff acted is thus stated in his opinion:

"That an injunction may be issued under such circumstances is now well established by decisions, and that it may apply to a criminal as well as a civil suit is not without precedent. A careful examination of the authorities leads me to the conclusion that in cases where a criminal prosecution has been instituted while a civil suit was pending involving the same subject-matter, and the parties procuring the indictment are the same as those who instituted the civil suit, the court whose jurisdiction was first sought, and before which such civil proceeding

is so pending and undetermined, will restrain the parties from prosecuting the indictment until it can hear and dispose of the civil suit."

In support of which the Judge cites the following authorities: *Turner v. Turner*, 15 Jurist 218; *Mayor of York v. Pilkington*, 2 Atk. 302; *Lord Montague v. Dudman*, 2 Ves. 396; *Attorney General v. Cleaver*, 18 Ves. 220, *Kerr v. Preston*, 6 Ch. D. 463; *Spink v. Francis*, 19 Fed. Rep. 670, and 20 Fed. Rep. 567; Eden on Injunctions, ch. 2, p. 42; Jeremy on Eq. Jurisp. ch. 3, p. 308; 3 Woods' Lectures, 56; 3 Dan. Ch. Pract. 1721.

The critic of Judge Goff's opinion says that the opinion of the Supreme Court *In re Sawyer*, 124 U. S. 209, where all of the authorities, English and American, are cited, is all the authority necessary to sustain his position, but he quotes only so much of the opinion as is favorable to him.

Mr. Justice Gray, who delivered the opinion in that case, said:

"The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*"

In Story's Equity Jurisprudence we find the same rule laid down. Says this celebrated author:

"There are, however, cases in which courts of equity will not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they will not interfere to stay proceedings in any criminal matters, or in any case not strictly of a civil nature. As, for instance, they will not grant an injunction to stay proceedings on a *mandamus*, or an indictment, or an information, or writ of prohibition. But this restriction applies only to cases where parties seeking redress by such proceedings are not the plaintiffs in equity; for if they are, the court possesses power to restrain them personally from proceeding, at the same time upon the same matter of right, for redress in the form of a civil suit and a criminal prosecution. In such cases the injunction is merely incidental to the ordinary power of the court to impose terms on parties who seek its aid in the furtherance of their rights."—2 Story Eq. Jurisprudence, section 893.

In Beach's Modern Equity Practice, the author declares:

"It is a rule of almost universal application, both in England and this country, that a court of equity has no jurisdiction to restrain a criminal proceeding, whether it be by indictment or summary process, unless the criminal proceeding be brought by a party to the suit already pending in the equity court, and to try the same right that is in issue there."—2 Beach Mod. Eq. Practice, sec. 761.

In the 1894 edition of "Extraordinary Relief," by Spelling, it is said that—

"While the State courts do not recognize the right of a court of equity to re-

strain a criminal prosecution, yet a different rule seems to prevail in Federal courts—*i. e.*, they can enjoin criminal prosecutions where the Federal Court has already acquired jurisdiction of the parties and the subject-matter."

See Spelling Extr. Relief, p. 87, sec. 71 and note. He cites and approves *Spink v. Francis*, 19 Fed. Rep. 670, and 20 Fed. Rep. 567.

It is said in 12 Am. and Eng. Encyc. of Law, page 292:

"This rule would seem to be vital to the harmonious movements of courts whose powers may be exerted within the same sphere and over the same subjects and persons. The only course of safety is where one court has jurisdiction over the subject, and possession of the case, for all others, with merely co-ordinate powers, to abstain from any interference. Any other rule would unavoidably lead to perpetual collision, and be productive of the most calamitous results." *Brook v. Deplaine*, 1 Md. Ch. Dec. 351-354.

The writer in the REGISTER contends that the right to grant restraining orders in criminal cases by a court of equity, under the foregoing principles, is limited to such cases as concern private rights and private wrongs. The authorities make no such limitation or distinction. Frequently, in violating a private right a public crime is committed, and if there are circumstances where an injunction would lie to the criminal prosecution in such a case, then, upon both reason and authority, an injunction would lie under the same circumstances to a prosecution for a crime, in the commission of which no private right was violated.

But it is claimed that Section 720 of the Revised Statutes of the United States prohibits the granting of injunctions in cases like the one under consideration, but Judge Goff holds that—

"Such insistence is without merit. Section 720 of the Revised Statutes must be construed in connection with section 716, which gives to the courts of the United States the power to issue all writs necessary to the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. If a United States court has first obtained jurisdiction of a case, it can then always take such action as may be required to maintain its authority and enforce its decree, and, under such circumstances, section 720 of the Revised Statutes of the United States is not applicable." *Fisk v. Union Pac. R. Co.*, 10 Blatchf. 518 (Fed. Cases, 4880); *French, Trustee, v. Hay*, 22 Wall. 250; *Deitzsch v. Huidekoper*, 103 U. S. 494; *Sharon v. Terry*, 36 Fed. Rep. 365; *President, &c. of Bowdoin College v. Merritt*, 59 Fed. Rep. 6.

It is clear from these authorities that Judge Goff was right in enjoining the prosecution of Mr. Wadley, and forbidding the use of papers on file in his court for that purpose. And yet we are told that Judge Goff's decision is wholly unsustained by law or precedent.

The reviewer of Judge Goff's opinion repeatedly refers to Mr. Wadley as a "criminal" and a "felon." Mr. Wadley has never

been judicially declared to be either; and, until that has been done, the application of such epithets to him is unjust, as tending to prejudice his case in the public estimation.

In the conclusion of his article, the writer wants to know how long it will be before Judge Goff will allow J. L. Gleaves to prosecute Mr. Wadley?

The recent spring elections in Wythe county put it altogether out of Judge Goff's power, if he were so disposed, to allow J. L. Gleaves to prosecute anybody.

But, as to what Judge Goff will eventually do in the Wadley case, we dare say that when the occasion shall arise for him to act, he will do that which it befits a judge to do.

Newbern, Va. J. C. WYSOR.

DEMURRERS TO EVIDENCE.

Heretofore it has been considered by the profession that the Court of Appeals is our court of last resort, whose decision of a legal question puts it beyond controversy, and whose merest *dictum* must be accepted by bench and bar as presumptive evidence of correct legal doctrine. But the establishment of the LAW REGISTER has changed all this by giving the bar at least the privilege of grumbling (or "protesting," if we must use its legal synonym), and the delightful chance of having the last word, even at the court.

It is proposed to take advantage of this opportunity by briefly reviewing a recent decision of the Court of Appeals, which must have startled those to whose attention it has been brought.

Allusion is made to the case of *Richmond & Danville Railroad Company v. Scott*, decided December 21, 1894, and reported in 20 S. E. Rep. 826. It is as follows:

"FAUNTLEROY, J. This is a writ of error to the judgment of the Circuit Court of Albemarle county, rendered on the 14th day of May, 1892, in an action of trespass on the case for damages, in said court pending, in which W. C. Scott, Jr., is plaintiff, and the Richmond & Danville Railroad Company is defendant. After the evidence was all heard, the defendant demurred thereto, and the jury assessed the plaintiff's damages at $2,500, subject to the judgment of the court upon the demurrer, and entered judgment for the plaintiff according to the verdict, and for costs. The case is here upon a writ of error, which was awarded by one of the judges of this court.